PARR RICHEY OBREMSKEY & MORTON
ATTORNEYS AT LAW
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INDIANAPOLIS, INDIANA 46204-2970
(317) 269-2500
FAX (317) 269-2514

DAVID S. RICHEY
PETER L. OBREMSKEY
DON F. MORTON
WARREN D. KREBS
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LEBANON, INDIANA 46052
(317) 482-0110 OR 873-4641
FAX (317) 873-5810

March 21, 1991

VIA FEDERAL EXPRESS

The Honorable J. F. Greene
Office of Administrative Law Judges
Mail Code A-110
401 "M" Street, S.W.
Washington, D.C. 20460

Re: In the Matter of Gary Development Company, Inc.
Docket No. RCRA-V-W-86-R-45

Dear Judge Greene:

I am sending to you today by Federal Express my Verified Motion to Extend Post-Hearing Briefing Schedule. I attempted to telephone Marc Radell at Region V on this today, but was unable to reach him. I am filing this Verified Motion one week before the scheduled filing of the post-hearing briefs, and I appreciate your consideration of this request.

Very truly yours,

PARR RICHEY OBREMSKEY & MORTON

By Warren D. Krebs

WDK/eu

cc: Marc C. Radell

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION V

IN THE MATTER OF:	)	
	)	DOCKET NO. RCRA-V-W-86-R-45
GARY DEVELOPMENT COMPANY	)	
GARY, INDIANA	)	JUDGE GREENE
	)	
EPA I.D. NO. IND 077 005 916	)	

VERIFIED MOTION TO EXTEND
POST-HEARING BRIEFING SCHEDULE

The Respondent Gary Development Company ("GDC") by counsel hereby moves for an extension of the post-hearing briefing schedule and in support thereof states:

1. The hearing in this matter was completed at Gary, Indiana, on December 18, 1990. The presiding Administrative Law Judge established March 29, 1991, for the filing of post-hearing briefs and April 19, 1991, for the filing of reply briefs.

2. The Respondent requires an extension of approximately four weeks for the filing of these post-hearing briefs because of the following:

A. GDC's counsel represents twelve electric cooperatives as potentially responsible parties ("PRPs") at the Missouri Electric Works site at Cape Girardeau, Missouri. Counsel is also Chairman of the Legal Committee for the MEW Steering Committee PRPs and a member of its Executive Committee. The MEW site is listed on the EPA's National Priorities List. On December 21, 1990, the Regional Administrator for

Region VII issued special notice letters to PRPs to do remedial activities at the site pursuant to a Record of Decision dated September 28, 1990. GDC's counsel was responsible for preparing the proposed Consent Decree which accompanied the good faith offer submitted by 180 PRPs to Region VII on March 4, 1991. Counsel is in the process of negotiating the Consent Decree with Region VII, and nearly half of the 60-day regulatory period for negotiations has expired.

B. GDC's counsel has been representing a PRP on the Fisher-Calo site which is listed upon EPA's National Priorities List. Counsel was involved in reviewing and negotiating elements of a good faith offer made by PRPs to EPA Region V on February 6, 1991.

C. On February 22, counsel for GDC was notified by the Montgomery County Circuit Court that a second choice case would proceed to trial during the week of February 25. This proceeding required the participation of GDC's counsel during that entire week.

D. On March 21, 1991, GDC's counsel was advised by Dr. Douglas R. Uselding that he needs to limit his hours of work for the next several weeks.

3. To the best of his recollection, GDC's counsel does not believe that GDC has previously requested extensions of filing dates established by the Administrative Law Judge.

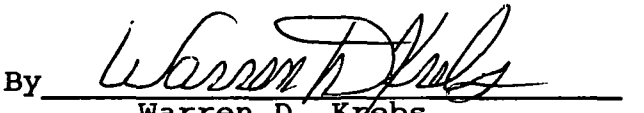
4. In order to properly review the extensive testimony given in this cause at various periods of time and the numerous exhibits introduced into evidence, and in order to properly prepare post-hearing briefs; GDC's counsel requires an extension of time of four weeks to April 26, 1991, to file Respondent's brief and to May 24, 1991, to file Respondent's reply brief.

5. GDC's counsel has telephoned the Region V counsel of record to inform him of the intent to file this Motion, but has been unable to speak with him. A copy of this Motion is being served upon counsel by Federal Express.

WHEREFORE, Respondent GDC moves the Administrative Law Judge to extend the dates for both parties to submit their respective post-hearing briefs to April 26, 1991, and to submit their reply briefs to May 24, 1991.

PARR RICHEY OBREMSKEY & MORTON

Attorneys for Gary Development Company, Inc.

By 
Warren D. Krebs

VERIFICATION

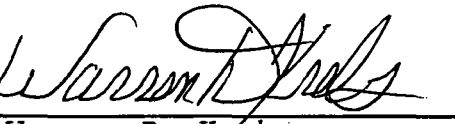
I affirm under the penalties for perjury that the foregoing representations are true.


Warren D. Krebs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Verified Motion to Extend Post-Hearing Briefing Schedule has been served upon the following via Federal Express, this 21st day of March, 1991:

Marc M. Radell
Office of Legal Counsel
U.S. EPA, Region V (5CS-TUB-3)
230 South Dearborn Street
Chicago, IL 60604



Warren D. Krebs

PARR RICHEY OBREMSKEY & MORTON
1600 Market Tower
Ten West Market Street
Indianapolis, IN 46204-2970
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Ten West Market Street
City: Indianapolis, **State:** Indiana **ZIP Required:** 46204-2970

2 To (Recipient's Name) Please Print: Hon. J. F. Greene
Recipient's Phone Number (Very Important): ( )
Company: Off. of Administrative Law Judges
Department/Floor No.: Mail Code A-110
Exact Street Address *(We Cannot Deliver to P.O. Boxes or P.O. ® Zip Codes.)*: 401 "M" Street, S.W.
City: Washington, **State:** D.C. **ZIP Required:** 20460

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5 [ ] Cash

H IF HOLD FOR PICK-UP, Print FEDEX Address Here
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City State ZIP Required

4 SERVICES (Check only one box)

Priority Overnight Service (Delivery by next business morning†)	Standard Overnight Service (Delivery by next business afternoon†)
11 [ ] YOUR PACKAGING	51 [ ]
16 [X] FEDEX LETTER *	56 [ ] FEDEX LETTER *
12 [ ] FEDEX PAK *	52 [ ] FEDEX PAK *
13 [ ] FEDEX BOX	53 [ ] FEDEX BOX
14 [ ] FEDEX TUBE	54 [ ] FEDEX TUBE
Economy Service (formerly Standard Air) (Delivery by second business day†)	**Heavyweight Service** (for Extra Large or any package over 150 lbs.)
30 [X] ECONOMY SERVICE	70 [ ] HEAVYWEIGHT **
	80 [ ] DEFERRED HEAVYWEIGHT **

†Delivery commitment may be later in some areas.
*Declared Value Limit $100.
**Call for delivery schedule.

DELIVERY AND SPECIAL HANDLING

1 [ ] HOLD FOR PICK-UP (Fill in Box H)
2 [X] DELIVER WEEKDAY
3 DELIVER SATURDAY (Extra charge) [ ]
4 [ ] DANGEROUS GOODS (Extra charge)
5 [ ] CONSTANT SURVEILLANCE SVC. (CSS) (Extra charge) (Release Signature Not Applicable)
6 [ ] DRY ICE ____ Lbs.
7 [ ] OTHER SPECIAL SERVICE ____
8 [ ]
9 [ ] SATURDAY PICK-UP (Extra charge)
10 [ ]
11 [ ] DESCRIPTION
12 [ ] HOLIDAY DELIVERY (If offered) (Extra charge)

PACKAGES	WEIGHT In Pounds Only	YOUR DECLARED VALUE	OVER SIZE
1			
Total 1	Total	Total	

DIM SHIPMENT (Heavyweight Services Only) [ ] ____ lbs.

Received At
1 ☐ Regular Stop 2 ☐ On-Call Stop
3 ☐ Drop Box 4 ☐ B.S.C. 5 ☑ Station

FedEx Emp. No.

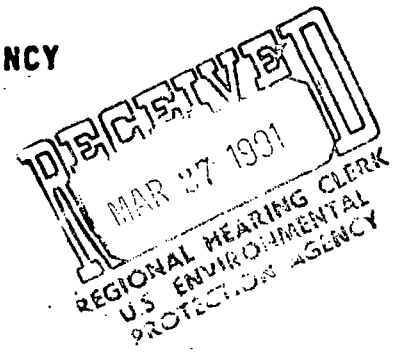
Emp. No. Date
☐ Cash Received
☐ Return Shipment
☐ Third Party ☐ Chg. To Del. ☐ Chg. To Hold
Street Address
City State Zip
Received By: X
Date/Time Received FedEx Employee Number

5 Release Signature: ____ Date/Time

Federal Express Use
Base Charges
Declared Value Charge
Other 1
Other 2
Total Charges

REVISION DATE 8/89
PART # 119501 WCSEL
FORMAT #014
014

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



In the Matter of

Gary Development Company, Inc.

Respondent

Docket No. RCRA-V-W-86-R-45

Judge Greene

ORDER CONTINUING BRIEFING SCHEDULE

For good cause shown, and there being no objection, it is hereby ORDERED that post-trial briefs shall be filed no later than April 26, 1991. Replies to post-trial briefs shall be filed no later than May 24, 1991.

J. F. Greene
Administrative Law Judge

Washington, D. C.
March 25, 1991

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on March 25, 1991.

Shirley Smith
Secretary

Ms. Beverely Shorty
Regional Hearing Clerk
Region V - EPA
230 South Dearborn Street
Chicago, IL 60604

Marc M. radell, Esq.
Office of Regional Counsel
Region V - EPA
230 South Dearborn Street
Chicago, IL 60604

Warren D. Krebs, Esq.
Parr, Richey, Obremskey & Morton
121 Mounument Circle, Suite 500
Indianapolis, Indiana 46204

PARR RICHEY OBREMSKEY & MORTON
ATTORNEYS AT LAW
1600 MARKET TOWER
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JAMES A.L. BUDDENBAUM
BRIDGET L. ROGERS

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Lebanon Office
225 W. MAIN STREET • P.O. BOX 666
LEBANON, INDIANA 46052
(317) 482-0110 OR 873-4641
FAX (317) 873-5810

April 18, 1991

VIA FEDERAL EXPRESS

The Honorable J. F. Greene
Office of Administrative Law Judges
Mail Code A-110
401 "M" Street, S.W.
Washington, D.C. 20460

Re: In the Matter of Gary Development Company, Inc.
Docket No. RCRA-V-W-86-R-45

Dear Judge Greene:

Because of the events sent forth in my Verified Motion granted on March 25, 1991, and in this Verified Motion, I believe it will be impossible for me to submit to you the brief of Gary Development Company this next Friday, April 26, 1991. I was unable to predict these recent events which required the filing of this second extension request. Please note that this request will only extend the period of submittal of this case to you for determination by seven days.

Very truly yours,

PARR RICHEY OBREMSKEY & MORTON

By Warren D. Krebs

WDK/eu

Enclosure

cc: Marc C. Radell (w/encl.)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION V

IN THE MATTER OF:	)	
	)	DOCKET NO. RCRA-V-W-86-R-45
GARY DEVELOPMENT COMPANY	)	
GARY, INDIANA	)	JUDGE GREENE
	)	
EPA I.D. NO. IND 077 005 916	)	

VERIFIED MOTION TO EXTEND POST-HEARING BRIEF
BY TWO WEEKS AND REPLY BRIEF BY ONE WEEK

The Respondent Gary Development Company, Inc. ("GDC"), by counsel, hereby moves for an extension of the post-hearing briefing schedule by requesting an additional two weeks to file the briefs of the parties and an additional one week to file the reply briefs of the parties, and in support thereof states:

1. The hearing in this matter was completed at Gary, Indiana, on December 18, 1990. The presiding Administrative Law Judge established March 29, 1991, for the filing of post-hearing briefs and April 19, 1991, for the filing of reply briefs.

2. GDC was granted on March 25, 1991, "for good cause shown" and without objection, an extension of four weeks until April 26, 1991, to file its brief and until May 24, 1991, to file its reply brief.

3. GDC requires an extension of an additional two weeks to file its brief and an additional extension of one week to file its reply brief because of the following:

A. GDC's counsel has been negotiating with Local 1393 of the International Brotherhood of Electrical Workers a new

labor agreement which was to have terminated on April 30, 1991. These negotiations were not completed until April 10, 1991, on behalf of an electric utility.

B. On April 3, 1991, the Judge of the Montgomery County Circuit Court ordered the submittal of proposed Findings of Fact and Conclusions of Law by April 19, 1991, in Cause No. 54C01-9008-DR-00369. GDC's counsel has primarily composed those Findings and Conclusions consisting of 32 pages which are due to be submitted tomorrow, on April 19, 1991.

C. As represented in its Verified Motion filed March 22, 1991, GDC's counsel represents twelve consumer-owned electric cooperatives as potentially responsible parties ("PRPs") at the Missouri Electric Works Site ("MEW") at Cape Girardeau, Missouri, which is listed on EPA's National Priorities List. As Chairman of the Legal Committee for the MEW Steering Committee and a member of its Executive Committee, GDC's counsel serves as one of three official members of its Committee negotiating with EPA Region VII at Kansas City, Kansas.

On December 21, 1990, the Regional Administrator for Region VII issued Special Notice Letters to PRPs to do remedial activities at the site. GDC's counsel was responsible for preparing the proposed Consent Decree which accompanied the Good Faith Offer submitted by 180 PRPs on March 4, 1991. Because of this, GDC's counsel has been

required to participate extensively in negotiations with representatives of EPA Region VII, EPA Headquarters and the Justice Department on March 14, April 10, and in the future on April 29 and 30. A copy of the individuals present at the negotiations held in Kansas City, Kansas on April 10 is attached as Exhibit A hereto. Additionally, GDC's counsel has been required to meet with numerous PRPs on April 10, 11, 16 and 17.

Because negotiations are scheduled to recommence on April 29, GDC's counsel is involved in preparing a written counter-offer to EPA due on April 24. This is two days prior to the date established for the filing of GDC's brief with Judge Greene. The 60-day period established to negotiate a Consent Decree with Region VII will expire on May 3, 1991. As of this date, Region VII has not authorized an extension of the negotiation period.

D. Because GDC's counsel will have the temporary custody of his three minor children, he is unable to spend substantial time on this brief during this weekend of April 20 and 21.

4. Because of these other commitments, GDC's counsel requires an extension of time consisting of two additional weeks until May 10, 1991, to file its brief, and an additional period of one week until May 31, 1991, to file its reply brief. This request, if granted, will only extend the submittal of this matter to the Administrative Law Judge by seven days.

5. GDC's counsel will telephone the Region V counsel of record to inform him of the submittal of this Motion, and a copy is concurrently being served upon counsel by Federal Express.

WHEREFORE, Respondent GDC moves the Administrative Law Judge to extend the dates for both parties to submit their respective post-hearing briefs to May 10, 1991, and to submit their post-hearing reply briefs to May 31, 1991.

PARR RICHEY OBREMSKEY & MORTON

Attorneys for Gary Development Company, Inc.

By _____
Warren D. Krebs

VERIFICATION

I affirm under the penalties of perjury that the foregoing representations are true.

_____
Warren D. Krebs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Verified Motion to Extend Post-Hearing Brief by Two Weeks and Reply Brief by One Week has been served upon the following via Federal Express, this 18th day of April, 1991:

Marc M. Radell
Office of Legal Counsel
U.S. EPA, Region V (5CS-TUB-3)
230 South Dearborn Street
Chicago, IL 60604

Warren D. Krebs

PARR RICHEY OBREMSKEY & MORTON
1600 Market Tower
Ten West Market Street
Indianapolis, IN 46204-2970
Telephone: (317) 269-2500

MEW Steering Comm. / EPA

4/11/91

Name	Organization
David Hoefer	EPA
Sarah T. Sullivan	EPA Counsel
David E. Schiller	EPA Counsel
Paulette R. Franco-Stitts	EPA - SPFD
Terry Hagen	Jacobs Engineering Group
Jim B. FELS	MDNR/DGLS
Jim KAVANAUGH	MDNR
Shelley A. Woods	Mo. AGO
Warren Mueller	Union Electric
Herb Newman	Mississippi Lime Co.
Richard Moss	So. ILL. Elect. Coop.
TERRY WEST	IN/IL/OH/TN Co-ops
WARREN D. KREBS	IN/ILL/OH/TN Coop Group
MICHAEL F BARNES	UNION ELECTRIC CO.
THOMAS E SIEDHOFF	UNION ELECTRIC CO
Al McMahon	Pepe, Martin for MEWSC
Stephen Cherry	Sommer & Barnard / Evansville Elec
John G Mathias Jr	Evansville Electric & Mfg.
Colleen West	EPA - SPFD
Norma Balding	EPA - CNSL
Robert L. May	EPA - Superfund
Ronald King	EPA - Superfund
Ann Keener	EPA - Cong. Relations
Elizabeth A. Edmonds	U.S. Dept. of Justice
Rich Gold	EPA - Office of Enforcement
Todd Dekker	Illinois Electric

EXHIBIT A

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AIRBILL
PACKAGE TRACKING NUMBER

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Ten West Market Street

City: Indianapolis, Indiana

State:

ZIP Required: 46204-2970

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Recipient's Phone Number (Very Important): ( )

Company: Off. of Administrative Law Judges

Department/Floor No.: Mail Code A-110

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City: Washington, D.C.

State:

ZIP Required: 20460

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5 [ ] Cash

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Street Address:
City: State: ZIP Required:

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		51 [ ]
11	[ ] YOUR PACKAGING	
16	[X] FEDEX LETTER *	56 [ ] FEDEX LETTER *
12	[ ] FEDEX PAK *	52 [ ] FEDEX PAK *
13	[ ] FEDEX BOX	53 [ ] FEDEX BOX
14	[ ] FEDEX TUBE	54 [ ] FEDEX TUBE

	Economy Service (formerly Standard Air) (Delivery by second business day†)	Heavyweight Service (for Extra Large or any package over 150 lbs.)
		70 [ ] HEAVYWEIGHT **
30	[ ] ECONOMY SERVICE	80 [ ] DEFERRED HEAVYWEIGHT **

†Delivery commitment may be later in some areas.
*Declared Value Limit $100.
**Call for delivery schedule.

DELIVERY AND SPECIAL HANDLING

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2 [X] DELIVER WEEKDAY
3 [ ] DELIVER SATURDAY (Extra charge)
4 [ ] DANGEROUS GOODS (Extra charge)
5 [ ] CONSTANT SURVEILLANCE SVC. (CSS) (Extra charge) (Release Signature Not Applicable)
6 [ ] DRY ICE ____ Lbs.
7 [ ] OTHER SPECIAL SERVICE ____
8 [ ]
9 [ ] SATURDAY PICK-UP (Extra charge)
10 [ ]
11 [ ] DESCRIPTION
12 [ ] HOLIDAY DELIVERY (If offered) (Extra charge)

PACKAGES	WEIGHT In Pounds Only	YOUR DECLARED VALUE	OVER SIZE
1			
Total 1	Total	Total	

DIM SHIPMENT (Heavyweight Services Only) [ ] ____ lbs.

Received At
1 ☐ Regular Stop
2 ☐ On-Call Stop
3 ☐ Drop Box 4 ☐ B.S.C. 5 ☐ Station

FedEx Emp. No.: Date/Time:

5 Release Signature:

Emp. No.: Date:
[ ] Cash Received
[ ] Return Shipment
[ ] Third Party [ ] Chg. To Del. [ ] Chg. To Hold
Street Address:
City: State: Zip:
Received By: X
Date/Time Received: FedEx Employee Number:

Federal Express Use
Base Charges
Declared Value Charge
Other 1
Other 2
Total Charges

REVISION DATE 8/89
PART # 119501 WCSEL
FORMAT #014
014

PARR RICHEY OBREMSKEY & MORTON
ATTORNEYS AT LAW
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TEN WEST MARKET STREET
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JAMES A.L. BUDDENBAUM
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Lebanon Office
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LEBANON, INDIANA 46052
(317) 482-0110 OR 873-4641
FAX (317) 873-5810

April 19, 1991

FEDERAL EXPRESS
AIRBILL NO. 4555987800

The Honorable J. F. Greene
Office of Administrative Law Judges
Mail Code A-110
401 "M" Street, S.W.
Washington, D.C. 20460

RE: In the Matter of Gary Development Company, Inc.
Docket No. RCRA-V-W-86-R-45

Dear Judge Greene:

Pursuant to my representation contained in the Verified Motion to Extend Post-Hearing Brief Schedule, I was able to reach EPA Regional Counsel Marc Radell by telephone on Friday morning, April 19, 1991. Mr. Radell indicated he had no objection to the granting of the extension to file the briefs on May 10 and reply briefs on May 31 in that this actually is only a one-week extension of the submittal.

Very truly yours,

PARR RICHEY OBREMSKEY & MORTON

By Warren D. Krebs

WDK/lh
cc: Marc C. Radell

FEDERAL EXPRESS

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AIRBILL
PACKAGE TRACKING NUMBER **4555987800**

4555987800

Date 4/19/91

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Your Phone Number (Very Important): (317) 369-2500
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Street Address: 1600 Market Tower, Ten West Market St.
City: Indianapolis, **State:** Indiana **ZIP Required:** 46204

2 To (Recipient's Name) Please Print: Honorable J. F. Greene
Recipient's Phone Number (Very Important): (202) 382-4856
Company: Office of Administrative Law Judges
Department/Floor No.: Mail Code A-110
Exact Street Address *(We Cannot Deliver to P.O. Boxes or P.O. ® Zip Codes.)*: 401 "M" Street, S.W.
City: Washington, **State:** D.C. **ZIP Required:** 20460

3 YOUR BILLING REFERENCE INFORMATION *(First 24 characters will appear on invoice.)*: 17510

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H IF HOLD FOR PICK-UP, Print FEDEX Address Here
Street Address
City State ZIP Required

4 SERVICES (Check only one box)

Priority Overnight Service (Delivery by next business morning†)		Standard Overnight Service (Delivery by next business afternoon†)	
11	YOUR PACKAGING	51	
16	FEDEX LETTER *	56	FEDEX LETTER *
12	FEDEX PAK *	52	FEDEX PAK *
13	FEDEX BOX	53	FEDEX BOX
14	FEDEX TUBE	54	FEDEX TUBE

Economy Service (formerly Standard Air) (Delivery by second business day†)		Heavyweight Service (for Extra Large or any package over 150 lbs.)	
30	ECONOMY SERVICE	70	HEAVYWEIGHT **
		80	DEFERRED HEAVYWEIGHT **

†Delivery commitment may be later in some areas.
*Declared Value Limit $100.
**Call for delivery schedule

DELIVERY AND SPECIAL HANDLING

1 ☐ HOLD FOR PICK-UP (Fill in Box H)
2 ☒ DELIVER WEEKDAY
3 DELIVER SATURDAY (Extra charge) ☐
4 ☐ DANGEROUS GOODS (Extra charge)
5 ☐ CONSTANT SURVEILLANCE SVC. (CSS) (Extra charge) (Release Signature Not Applicable)
6 ☐ DRY ICE ____ Lbs.
7 ☐ OTHER SPECIAL SERVICE ____
8 ☐
9 ☐ SATURDAY PICK-UP (Extra charge)
10 ☐
11 ☐ DESCRIPTION
12 ☐ HOLIDAY DELIVERY (If offered) (Extra charge)

PACKAGES	WEIGHT In Pounds Only	YOUR DECLARED VALUE	OVER SIZE
Total	Total	Total	

DIM SHIPMENT (Heavyweight Services Only) ☐ ____ lbs.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of

Gary Development Company, Inc.

Respondent

Docket No. RCRA-V-W-86-R-45

Judge Greene

SCHEDULING ORDER

For good cause shown, and it having been represented that there is no objection, the time for filing post trial briefs is hereby extended through May 10, 1991. Reply briefs shall be filed no later than May 31, 1991.

J. F. Greene
Administrative Law Judge

Washington, D. C.
April 22, 1991

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on April 23, 1991.

Shirley Smith
Secretary

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May 8, 1991

VIA FEDERAL EXPRESS

The Honorable J. F. Greene
Office of Administrative Law Judges
Mail Code A-110
401 "M" Street, S.W.
Washington, D.C. 20460

Re: In the Matter of Gary Development Company, Inc.
Docket No. RCRA-V-W-86-R-45

Dear Judge Greene:

I am transmitting to you by Federal Express the Post-Hearing Brief of Gary Development which is due to be filed on May 10 pursuant to your Order granting GDC and Region V an extension in the briefing schedule. I have also enclosed a copy of the brief.

Very truly yours,

PARR RICHEY OBREMSKEY & MORTON

By Warren Krebs

WDK/eu

Enclosures

cc: Marc C. Radell (w/encl.)
Beverly Shorty,
Regional Hearing Clerk (w/encl.)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION V

IN THE MATTER OF:	)	
	)	DOCKET NO. RCRA-V-W-86-R-45
GARY DEVELOPMENT COMPANY	)	
GARY, INDIANA	)	JUDGE GREENE
	)	
EPA I.D. NO. IND 077 005 916	)	

POST-HEARING BRIEF OF GARY DEVELOPMENT

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION V

IN THE MATTER OF:	)	
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GARY, INDIANA	)	JUDGE GREENE
	)	
EPA I.D. NO. IND 077 005 916	)	

POST-HEARING BRIEF OF GARY DEVELOPMENT

I. STATEMENT OF THE CASE

On May 30, 1986, the Director of Region V's Waste Management Division issued a Complaint and Compliance Order against the Respondent Gary Development Company, Inc. ("GDC"). The Complaint alleges that GDC "owns and operates a hazardous waste management facility" located at 479 North Cline Avenue, Gary, Indiana, because GDC allegedly has disposed of four different types of hazardous waste. At the commencement of the evidentiary hearing, Region V stipulated to withdraw its allegation that GDC had disposed of Jones and Laughlin Steel Company waste water treatment sludge classified as F006. The reason for the withdrawal of this allegation was that this waste had been the "subject of a temporary delisting order from (EPA) headquarters during all relevant times of the alleged actions, and therefore is not subject to regulations." (TR of Sept. 9, 1987, p. 5) As for the remaining waste allegations, Region V contends that GDC disposed of the following:

1. 300,000,000 gallons of Jones and Laughlin decanter tar sludge classified as K087 waste from November 1, 1980, to March, 1982.
2. 120,000 gallons by 33 shipments of American Chemical Services' paint sludge classified as F005 waste from December, 1980, to November, 1981.
3. Waste classified as D008 from U.S.S. Lead Refinery between November 20, 1980, and December, 1982, by the following waste streams:
   A. 760,000 gallons of calcium sulfate sludge.
   B. 900 cubic yards of rubber battery chips.
   C. 200 cubic yards of reverb slag. (TR of Sept. 9, 1987, pp. 5-8)

EPA contends that because of the disposal of these types of waste, GDC must comply with the Indiana Hazardous Waste Regulations and "must close its facility." (See Complaint, paras. 12-16) In its Compliance Order, EPA ordered GDC to comply with numerous state regulations and assessed a penalty of $117,000.

Pursuant to the Notice of Opportunity for Hearing, GDC timely submitted its Request for Hearing and Answer and Responsive Pleadings on approximately July 1, 1986. GDC contested the Region V jurisdiction, objected to Region V's attempt to enforce regulations of the state of Indiana and disputed the allegations that it had disposed of RCRA hazardous waste. In summary, GDC responded that because it did not accept

RCRA hazardous waste and because EPA never issued GDC an interim status permit in response to its Part A application, all provisions in the Compliance Order and the penalty were invalid.

An evidentiary hearing was commenced on September 9, 1987, at Gary, Indiana. Because of the length of the testimony, the hearing was adjourned and subsequently reconvened on December 17, 1990. Post-hearing briefs were ordered to be submitted on March 29 and reply briefs on April 19. The briefing schedule was changed to May 10 and May 31 after Motions by GDC's counsel.

II. STATEMENT OF THE FACTS

The Respondent GDC has operated a disposal facility in Lake County, Indiana, beginning in 1974. The Indiana environmental agency granted GDC a Construction Permit for a sanitary landfill on June 19, 1973. (R. Ex. 4, p. 1) The state agency granted GDC final approval to commence sanitary landfilling operations after a final inspection of the site on August 29, 1974. (R. Ex. 4, p. 2) On February 16, 1982, the Indiana Environmental Management Board ("IEMB") advised GDC that its Operating Permit 45-2 had been renewed and that its revised construction plans had been approved subject to nine conditions. (R. Ex. 4, p. 2)

Prior to its use as a landfill, the site had been excavated 35 feet below ground level to remove sand and gravel utilized in constructing the adjacent Indiana toll road extension. Subsequently, 30 feet of clay was excavated, making a pit approximately 65 feet deep. (TR of Dec. 17, 1990, p. 817) An

additional 35 feet of clay lies below the base of the landfill and above the top of the bedrock surface which consists of Silurian dolomitic rock occurring at a depth of 100 to 110 feet. (TR 817 and 818) The GDC site's potable water producing well had to be extended to a depth of 440 feet below the surface. The need to drill 340 feet into the bedrock was because the rock's permeability was not good close to the base of the glacial material. (TR, p. 823) During 1973, the water which had filled the pit was pumped off the 62-acre site. (TR Vol. III, at p. 732) The state of Indiana issued GDC a permit in 1974 to operate a sanitary landfill. (TR Vol. III, at p. 733)

Because the water table is approximately ten feet below the original ground surface, a clay liner was installed continuously during landfilling on the inside of the excavation's walls to prevent the infiltration of groundwater into the site and solid waste. (TR of Dec. 17, 1990, at p. 818) The thickness of the clay liner on the perimeter walls ranges from six to ten feet. (TR Vol. III at p. 682) However, no clay liner could be constructed along the north wall of the site because permission was not obtained from the state to fill that part of the landfill. (TR of Dec. 17, 1990, at pp. 834 and 835; TR Vol. III, at p. 734)

During 1985, ATEC Associates performed a study on the landfill's west clay wall by placing four borings through the liner. Pursuant to an Agreed Order between GDC and the Indiana environmental agency adopted in February, 1983, no remedial

action would be necessary at GDC if the permeability of the clay wall was at least 5.0 x 10^{-6} centimeters per second or less. (R. Ex. 4 at para. 7(C)) The permeability test results of the ATEC borings revealed that the wall's permeability ranges from eight to 208 times less permeable than the requirement established by the state environmental agency. (TR of Dec. 17, 1990, at pp. 821 and 822) The more than adequate clay lining on the walls was recognized by the IEMB staff as was determined in an Order issued by an IEMB administrative law judge on September 30, 1986. (R. Ex. 9, p. 9, para. 4; TR Vol. III, pp. 654 and 655)

Pursuant to the requirements of its state sanitary landfill permit, GDC quarterly samples four monitoring wells located around the perimeters of its facility. (TR of 1990, at 825 and 826) The analytical results done by the Lake County Health Department on samples taken in 1990 revealed that the chloride content is quite low. Chloride is a very good indicator of the movement of leachate material from a landfill containing refuse and garbage. The reported levels of ten to fifteen parts per million indicate no leachate movement out through the site's liner. (TR 826 and 827)

GDC ceased its landfilling operations in late August, 1989, when it ceased accepting waste for disposal. Subsequently, GDC has brought clay to the site to cover the landfill as part of closure activity. (TR 830) The state environmental agency is requiring two feet of clay over most of the disposal site. However, the eastern portion of the facility has an area

approximately 700 feet in width which was capped previously with a hardened flyash mixture. (TR 830 and 831) The depth of the flyash mixture ranges from five to twelve feet. (TR Vol. III, at p. 677) Recent 1990 state inspection reports note that clay cover was being placed over a portion of the site and that additional clay was needed on its western part. (TR 837)

During its fifteen years of operations, GDC was never required to pay any penalties for the violation of state or federal regulations, and no enforcement actions have been brought against it. However, GDC did pay an agreed upon penalty to the Indiana Department of Environmental Management ("IDEM") in October, 1990. This was due to an accidental fire which the IDEM agreed the Gary Fire Department had refused to extinguish. (R. Ex. 17; TR Vol. III, at pp. 740 and 741)

The state environmental agency continues even during 1990 to inspect the GDC facility utilizing forms for conventional solid waste rather than for hazardous waste. (TR of Dec. 17, 1990, at p. 836) Although GDC did file a Part A to obtain interim status as a hazardous waste disposal facility, interim status was never obtained. Region V on June 18, 1982, issued GDC a letter notifying that "it is U.S. EPA's advisory opinion that your facility does not have interim status as defined in 40 C.F.R. 122.23." (R. Ex. 3) Although the state environmental agency did inform GDC of RCRA groundwater monitoring requirements by letter of September 9, 1983, this letter was premised upon "if you [GDC] have qualified for interim status and you operate (or operated

since November 19, 1980) a landfill." (R. Ex. 5) GDC had not qualified for interim status.

On October 11, 1990, the Commissioner of the Indiana Department of Environmental Management approved an Agreed Order between the IDEM and GDC regarding the accidental fire. On October 16, 1990, the Commissioner of the IDEM issued an Order requiring GDC to apply for a NPDES permit for any future discharges of surface waters. Both Orders by the state's top environmental official classify GDC as a "sanitary landfill," not as a hazardous waste landfill. (R. Exs. 17 and 16)

III. ARGUMENT AND DISPUTED FACTS

A. EPA Has Precluded Itself From Bringing RCRA Closure Proceeding Actions Where a State Has Received the Appropriate Authorization Under RCRA to Commence Closure Proceedings Within Its Jurisdiction.

Region V's attempts to utilize of RCRA Section 3008(a)(2) to determine closure obligations of a facility under the disguise of an enforcement action and to compel a facility to implement state closure requirements for the entire area of the facility. This is antithetical to both a 1986 RCRA appeal order rendered by U.S. EPA Administrator Lee M. Thomas and to arguments made to the United States Circuit Court of Appeals for the Seventh Circuit by the United States Justice Department ("Justice") on behalf of the EPA and its Administrator.

In RCRA Appeal 84-4, Administrator Thomas addressed the specific issues raised in this case, i.e., whether EPA maintained jurisdiction (1) to bring closure proceedings against facilities located within Indiana where the state held RCRA interim status authorization and (2) to initially determine closure obligations including which areas of a facility are subject to closure. On October 12, 1984, Region V had not only denied the hazardous waste Part B permit application of Northside Sanitary Landfill, Inc. ("Northside"), but also had terminated Northside's interim status and ordered it to "immediately commence closure proceedings as required under the Indiana hazardous waste rules (320 IAC 4)." Region V's Comments to its denial stated that "[t]he entire hazardous waste management landfill area outlined in the November 18, 1980, Part A permit application must be closed," rather than the much smaller 12-acre tract of the facility where RCRA hazardous wastes had been disposed after November 18, 1980.

Northside appealed this decision to the EPA Administrator. On April 3, 1985, Administrator Thomas issued his Order Denying Review in RCRA Appeal No. 84-4, and affirming the Region V decision to include Northside's Old Farm Area as part of the facility subject to closure. Mr. Thomas held at page 2 of this Order:

> The location and dimensions of a hazardous waste facility are probably two of the most rudimentary pieces of information that go into a proper permit decision. If the permit decision does not identify where the facility is located, or how big it is, the permit decision cannot be implemented successfully

> regardless of the outcome of the decision. This is particularly apparent in the present case, for either including or excluding the Old Farm Area will significantly alter the area of Petitioner's landfill that is subject to the closure and post-closure requirements of the regulations, 40 CFR Part 265 (Subpart G). (emphasis added)

Northside appealed the Administrator's Order to the United States Court of Appeals for the Seventh Circuit arguing deprivation (1) of federal review provisions of RCRA which require an evidentiary hearing, (2) of review under the Administrative Procedure Act, and (3) of due process; and that the closure order for the entire facility was unsupported by substantial evidence and contrary to the facts.

Thirty days after Northside had filed its brief with the Court, and just ten days before the filing of EPA's brief with the Court, Administrator Thomas issued his Order on Reconsideration in RCRA Appeal No. 84-4 on November 27, 1985. Specifically quoting the section of his original Order Denying Review as set forth above, the Administrator reversed his decision as to the jurisdiction of Region V to determine closure obligations. Discussing the jurisdiction for closure determinations under RCRA Section 3006, the Administrator noted the "crucial distinction between permit determinations, which decide whether and under what conditions waste may be managed on the property, and closure determinations, which are concerned with which areas were used for hazardous waste management and what specific technical requirements, such as cover or maintenance requirements, should apply to those areas."

(underlining by Administrator) Mr. Thomas held in this new Order:

> Any such construction of this language is in error in the context of this case because Indiana has been granted the authority to make the closure determination pursuant to §3006 of RCRA, a fact that was not brought to light in the parties' original submission. Sections 3006(b) and (c) provide that when a qualified state receives authorization the federal program is suspended and the hazardous waste program operates under state law. In this instance, Indiana received a so-called Phase I authorization on August 18, 1982, which gave the state the necessary authority to approve the closure plan of any facility whose permit application has been denied by EPA. See 40 CFR §271.128(e)(2). Under a Phase I authorization EPA retains the authority to issue permits and, therefore, was the proper authority to issue the permit denial. However, because of the Phase I authorization, EPA was not the proper authority to decide which areas of the facility should close -- Indiana was. (Order on Reconsideration, pp. 4-5) (emphasis added)

* * *

In view of the foregoing, Petitioner's claim that it has been denied an adequate hearing on the closure determination must be rejected. Indiana, not EPA, has the authority to approve Petitioner's closure plan, including the responsibility to decide which areas of the facility have to comply with specific closure requirements such as the requirement for a final cover. Because state law has superseded the federal closure requirements, 40 CFR Part 265 (Subpart G), the closure proceedings will take place under the procedures established by the Indiana regulations corresponding to the federal requirements, and the closure plan must comply with the standards set out in Indiana law. Petitioner will therefore have the opportunity to present its arguments to the state. The Region's statement that the Old Farm Area must close cannot be viewed as a final action imposing closure obligations on Petitioner, for the statement is without legal effect as previously stated.

Granting Petitioner an additional hearing in a federal administrative forum would not only call the state's authority into question -- by requiring EPA to decide a state law matter -- but would also undoubtedly duplicate the efforts of state officials. Inasmuch as

> Petitioner does not challenge its permit denial but wishes only to be heard on the issue of its closure obligations, no purpose would be served by the submission of such evidence in a federal rather than a state proceeding. Indeed, Petitioner admits that some of the information it wishes to submit to EPA has already been submitted in state proceedings. The state administrative agency therefore provides the proper forum for resolving questions about Petitioner's closure obligations.[9] (emphasis added)

> [9]When a state has been authorized to administer some but not all of the hazardous waste management program, EPA should attempt to organize administrative procedures so as to avoid conflict with state decision-making authority and minimize duplication and overlap as much as possible.

(Order on Reconsideration, pp. 6-8)

The Justice Department on behalf of EPA and its Administrator successfully argued to the Court of Appeals that the Order on Reconsideration was of such importance that it should be added to the administrative record being reviewed even though the EPA decision was issued long before the Reconsideration Order. Justice argued a complete lack of EPA authority and jurisdiction in its Brief to the Seventh Circuit Court:

> Pursuant to section 3006 of RCRA, 42 U.S.C. §6926 (1982), as amended, a state which satisfies necessary requirements will be authorized by EPA to administer and enforce a RCRA hazardous waste program within its borders in lieu of a federal program.[11]

> [11]This is not a discretionary delegation of federal powers; rather, the federal program is suspended, and the program operates under state law. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 29 (1976).

(Brief of U.S. EPA in Cause No. 85-2119 before the United States Court of Appeals for the Seventh Circuit, p. 20)

* * *

Because Indiana is solely responsible for approving Northside's closure plan, Indiana is free to impose closure requirements in accordance with its laws, and EPA's role, if any, in this process would be no more than an advisory or consultative one. (EPA Brief, p. 21)

* * *

Closure determinations are likely to be more limited in scope than permit determinations. Although a facility as a whole is subject to interim status and to the Act's permit application requirement, the actual conditions of the permit (for permitted facilities) or the specific requirements of the interim status regulations (for facilities operating under interim status) determine which geographic areas of the facility are subject to the technical requirements of the regulations. (EPA Brief, pp. 28-29)

* * *

Northside, by requesting a new hearing, essentially seeks an opportunity to use EPA's permit application proceeding so as to preempt or collaterally attack Indiana's decisionmaking authority in the state closure proceeding. In other words, although Northside no longer even wants a permit, it seeks to compel EPA to make findings or statements in the permit application proceeding which it can then attempt to use to its advantage in any state administrative review or judicial review preceding involving its closure plan. This is impermissible. Once a state has received Phase I authorization, it is responsible for making closure determinations, and EPA cannot legally commit the state to make any particular determinations. See Administrator's Order on Reconsideration.

The result which Northside ultimately wants -- a determination that only a small portion of its facility should be subject to closure -- is one which it must seek from Indiana. It can make its arguments before the state agency and present any evidence which it believes is probative. Moreover, it can pursue its remedies under the administrative review and judicial review provisions of Indiana law. (EPA Brief, p. 33) (all emphasis added)

The Seventh Circuit denied Northside's Petition for Review and did not order EPA to conduct an evidentiary hearing. The Court accepted EPA's position that the extent of Northside's closure obligations was an issue to be determined by the state of Indiana and that Northside would have due process remedies under administrative review and judicial review provisions of Indiana law. The Seventh Circuit held in Northside Sanitary Landfill, Inc. v. Lee M. Thomas, 804 F.2d 371, 381-382, on October 23, 1986:

> Once the state agency has received authorization for its program, it shall "carry out such program in lieu of the Federal program." 42 U.S.C. §6926(a). The EPA simply does not have the legal authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. See 40 C.F.R. §265.1(c)(4). The State of Indiana alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised it judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action or to modify the agreement. Cf. Shell Oil Co. v. Train, 585 F.2d 408, 414 (9th Cir. 1978) (EPA recommendation that state deny NPDES variance request constituted advice to state, and was not reviewable in federal court.) (emphasis added)

EPA and the Justice Department advocated this position to the Court even providing the Court with the adopted authority of Shell Oil Co. v. Train. (See EPA Response of October 7, 1987, pp. 22-23)

The Seventh Circuit Court further held at 382:

> In the instant case, the disputed remarks of the EPA arose as responses to comments made by a representative of Northside at the public hearing held on the denial

> of Northside's Part B application. Participants at the hearing were allotted only five minutes to comment upon the proposed permit denial. Hence, it is clear that the parties were not given a full and fair opportunity to litigate the issue of which areas of Northside's facility were subject to closure. More important, because, as we noted above, the EPA did not have the authority to make closure findings and determinations, these issues were not properly before it. Hence, Northside cannot claim that it has been injured by the allegedly preclusive effect of the EPA's statements. Brotherhood of Locomotive Engineers v. ICC, 761 F.2d 714 (D.C. Cir. 1985) (emphasis added)

The Seventh Circuit admonished EPA in the final paragraph of its decision:

> Distilled to its essence, Northside's argument asks us to either determine the proper scope of closure or to order the EPA to hold a formal evidentiary hearing for it to do so. Neither is a remedy that we have the authority to grant. We do, however, caution the Administrator against commenting on the scope of closure in a case such as this where a state agency has the sole authority to decide such matters. Even though the Administrator's comments in these regards are not legally binding on the state agency, they may give rise to delicate questions of the state agency's exercise of independent judgment. The Administrator must bear in mind the sensitive relationship existing between it and state agencies.

Id. at 386.

Region V's Complaint against GDC ignores Administrator Thomas' Order on Reconsideration, which just six months earlier had reversed Region V's prior interference into Indiana's "sole authority" and independent judgment to determine the scope of any RCRA closure obligations. The GDC Complaint is contrary to the decision of the Seventh Circuit issued October 29, 1986, because EPA will be determining "whether, for what purposes, and which areas of GDC's facility must be closed." Indeed, the Region V Order is not even limited to whether GDC is obligated to proceed

through RCRA closure, but even sets forth timetables and criteria which GDC would be required to utilize.

Region V has admitted in its GDC Complaint that interim status facilities in Indiana are regulated under the Indiana regulations "rather than the Federal regulations set forth at 40 C.F.R. Part 265." (Complaint, p. 2) Most incredible is the fact that Region V has issued GDC a closure order where it alleges that GDC never held interim status subject to termination and never had submitted a permit application which would be subject to EPA's "retained" jurisdiction "to issue permits." (See Administrator's Order on Reconsideration, pp. 4-5)

In Northside, the EPA's Administrator interpreted the RCRA statutes as to the proper jurisdictional forum to determine obligations for RCRA closure and the scope of closure. EPA's interpretation was accepted by the Seventh Circuit, but with that Court admonishing EPA not to interfere in the future with Indiana's "sole authority" and to recognize the "sensitive relationship existing between it and state agencies." Indiana has exercised its "independent judgment" by (1) not determining GDC to be subject to RCRA type closure and (2) not bringing an enforcement action. This is insufficient reason for Region V to ignore the Administrator's Order and the Seventh Circuit's admonition. In fact, recognizing the existence of a presumption of unreviewability of agency decisions not to undertake enforcement actions, Justice Rehnquist writing for the Supreme Court majority in Heckler v. Chaney, 105 S.Ct. 1649, 1656 stated:

> Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of the prosecutor in the Executive Branch not to indite, a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, §3.

Region V previously has made only one argument as a response, i.e., the present litigation is an enforcement action, not a determination regarding closure; and, that somehow, an unpublished order by a federal district court and an unpublished decision by an EPA administrative law judge have precedence over the clear determinations of the Administrator and the Seventh Circuit. Neither the Seventh Circuit's opinion nor Justice's arguments were "limited to restricting U.S. EPA's review of closure plans in authorized states" as is now contended by Region V. The Seventh Circuit nowhere limited its decision to the technical aspect of closure plans, but instead held:

> The EPA simply does not have the legal authority to determine **whether**, for what purposes, or which areas of Northside's facility must be closed. See 40 C.F.R. §265.1(c)(4). The State of Indiana alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the **enforcement action** taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an **independent enforcement action** or to modify the agreement. Cf. Shell Oil Co. v. Train, 585 F.2d 408, 414 (9th Cir. 1978) (emphasis added)

Northside, 804 F.2d at 381-382.

Obviously, the Seventh Circuit accepted the arguments by Justice that the EPA was precluded from all aspects of closure, especially as to determining "whether" closure even applied to a facility and "what areas" of a facility might be subject to closure. The Court held that EPA could not subvert the state's "sole authority" and "independent judgment" by bringing "an independent enforcement action which is merely a disguised threshold determination of the applicability and scope of closure." This is precisely what Region V's Complaint attempts to do by bringing an "enforcement action" to make GDC's entire facility subject to state RCRA closure regulations and to dictate both the specific timetables and the contents of related closure plans and assessments.

The Seventh Circuit held that EPA may not interfere with the state unless the state it has not "exercised its judgment in a reasonable manner and within its statutory authority." Northside, 804 F.2d at 382. This holding is consistent with the legislative history of RCRA as to federal enforcement actions:

> This legislation permits the states to take the lead in the enforcement of the hazardous wastes laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal

> hazardous waste program pursuant to title III of this act.

5 U.S. Code Cong. & Admin. News, at 6269, (1976). (emphasis added)

Contrary to the facts of the Order in United States v. Conservation Chemical Co. of Illinois, Civ. No. H86-9 (N.D. Ind.) (cited as authority by Region V), no evidence exists in the GDC administrative record that Indiana failed to exercise its judgment in a reasonable manner and within its statutory authority as to GDC. No evidence was offered to show that Indiana is not implementing a hazardous waste program or that its program does not meet the federal minimum requirements. To the contrary, just four months prior to Region V issuing the GDC Complaint, the Administrator on January 31, 1986, had granted Indiana Phase II authorization to even issue all RCRA permits. See Northside v. Thomas, supra, at 382. Region V has rested its evidentiary case without offering any negative evidence against Indiana's program and enforcement decisions. In Conservation Chemical, the District Court found determinative EPA's submission of a letter dated February 25, 1986, from the Indiana Attorney General informing that the IEMB's Land Pollution Control Division was putting its administrative enforcement action "on hold" pending the outcome of the EPA litigation before the district court. The Northern District Court discussed the significance of this letter twice, and found this to be the distinguishing factor between Conservation Chemical and Northside concluding:

> In Northside, the court [Seventh Circuit] stated that as long as the state has acted reasonably in enforcing its program, the EPA should not interfere. 804 F.2d at 382.

(See Appendix 3, p. 23, to Region V's 1987 Response to Motion to Dismiss.) (The Order in Chemical Conservation reflects that the Northern Indiana District Court evidently was not apprised of the specifics of Administrator Thomas' Order on Reconsideration nor as to the U.S. Justice Department's written and oral arguments made to the Seventh Circuit. Neither are discussed nor even referenced in the Court's Order.)

To the contrary, the IEMB (subsequently the Indiana Department of Environmental Management ("IDEM")) during February, 1983, and again as late as September 30, 1986, had entered into, interpreted, and enforced a legally binding Settlement Agreement and Agreed Order "govern[ing] construction and operations at the [GDC] site." (See R. Exs. 4 and 9) This was four months after Region V issued its Complaint against GDC. The IDEM Findings in N-146 of September 30, 1986, reflect that the IEMB Board, which was the ultimate authority of the agency, had conducted a hearing regarding GDC on November 15, 1985, and had remanded for an additional evidentiary hearing. This additional hearing was actually taking place during the time that Region V issued its Complaint. (R. Ex. 9; Findings 14, 15 and 16; and Discussion on p. 9) During 1990, two separate actions were commenced by the IDEM Commissioner as to GDC's operations. (R. Exs. 16 and 17)

B. The Related Doctrines of Res Judicata and Collateral Estoppel Bar This Action Because the State of Indiana Has Previously Entered Into a Consent Agreement and Order Establishing the Manner in Which GDC's Facility Shall Be Operated.

Because Region V as a federal agency has filed a Complaint to make GDC comply with certain regulations of the state of Indiana, both the federal and Indiana principles of res judicata and collateral estoppel are applicable. The federal courts even recognize the concept of offensive estoppel rather than only defensive estoppel. The federal law of res judicata, its applicability and its importance were set forth by the Supreme Court of the United States in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). Writing the majority opinion from which only one justice dissented, now Chief Justice Rehnquist discussed this doctrine:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1877). Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. Angel v. Bullington, 330 U.S. 183, 187 (1947); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Wilson's Executor v. Deen, 121 U.S. 525, 534 (1887). As this Court explained in Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 325 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that

> "[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert." Reed v. Allen, 286 U.S. 191, 201 (1932).

In Federated, the Ninth Circuit had reversed the district court's dismissal of anti-trust claims on the basis of res judicata. The Court of Appeals determined that the District Court's first dismissal of the action, which dismissal was subsequently the reason for dismissing a second action on the basis of res judicata, was in error "because the instant dismissal [the first one] rested on a case that has been effectively overruled" by a U.S. Supreme Court decision issued while the District Court's appeal was pending before the Ninth Circuit. The Ninth Circuit held that the doctrine of res judicata must give way to "public policy" and "simple justice." Eight Supreme Court Justices disagreed. The Supreme Court held in Federated, at 401:

> The Court of Appeals also rested its opinion in part on what is viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individuals judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." Heiser v. Woodruff, 327 U.S. 726, 733 (1946). The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931). We have stressed that

"[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917). The language used by this Court half a century ago is even more compelling in view of today's crowded dockets:

> "The predicament in which respondent finds himself is of his own making . . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation--a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." Reed v. Allen, 286 U.S., at 198-199.

Thus, the Supreme Court has recognized (1) no exception to following the principle of res judicata; (2) that it serves vital public interest; (3) that it precludes not only issues raised, but all issues which "could have been raised"; and (4) that it is applicable not only to the parties to the litigation, but also "their privies."

Privity exists in this pending litigation (1) because EPA has admitted to granting the state of Indiana both Phase I interim authorization and Phase II final authorization to administer a hazardous waste program in lieu of the federal program, and (2) because EPA has brought this action for the purpose of compelling GDC to comply with hazardous waste regulations of Indiana. (Complaint, p. 2) Indeed, Region V's

Order requires GDC to submit plans and assessments to both U.S. EPA and the Indiana Department of Environmental Management ("IDEM") "for approval." (Complaint, pp. 13, 14 and 17) Thus, res judicata bars the EPA from litigating any issue which was or could have been raised in prior litigation between GDC and the state IDEM. This is so even if a state judgment was erroneous or rested on a legal principle subsequently overruled in another case.

Both GDC and Region V offered into evidence the Settlement Agreement and Recommended Agreed Order in Cause No. N-53 captioned In the Matter of Gary Development, Inc., Petitioner, v. Environmental Management Board of the State of Indiana, Respondent. (R. Ex. 4 and C. Ex. 4) The Agreed Order certified by James M. Garrettson was recommended by Judge Garrettson and approved and entered by the state IEMB on February 18, 1983. (The IEMB was during 1983 the ultimate authority of the state's environmental agency, and its Technical Secretary was the highest staff official. I.C. 13-7-2-1, -2 and -6. These statutes were repealed by the Indiana General Assembly effective July 1, 1986, due to the creation of the successor Indiana Solid Waste Management Board and the Indiana Department of Environmental Management.) The Order also reflects that the IEMB was represented by the Attorney General of Indiana who approved the Agreed Order for "legality and form."

This Agreed Order modified GDC's landfill construction permit and operating permit issued by Indiana and provided that

its provisions "shall govern construction and operations at the site from the date this Recommended Agreed Order is approved by EMB." (R. Ex. 4, p. 3) The Agreed Order sets forth many items encompassed in Region V's Compliance Order including installation of a leachate collection system and a perimeter seal; the number, location, frequency of testing, and parameters at facility monitoring wells; the acceptable permeability for the site's clay perimeter walls; continuing jurisdiction of the IDEM judge to determine any necessary remedial action; and permission to receive specified "special wastes." (R. Ex. 4 and TR III, p. 648) Although Region V has contended that this Agreed Order has nothing to do with the regulation of hazardous wastes, the Order at page 7 specifically cites I.C. 13-7-11-3 (1982). This state statute provided for hearings under Chapter 11 which is entitled "Enforcement" under the Indiana Environmental Management Act. (See I.C. 13-7-1-1 and 13-7-19-3.) The Agreed Order also discusses "RCRA hazardous waste" and references 320 I.A.C. 4-3 which was a portion of an Indiana regulation entitled "Hazardous Waste Management Permit Program and Related Hazardous Waste Management Requirements." This regulation specifically has as its purpose:

> Protecting and enhancing the quality of Indiana's environment and protecting the public health, safety, and well-being of its citizens and establishing a hazardous waste management program consistent with the requirements of the Resource Conservation and Recovery Act (P.L. 94-580), as amended including the amendments

made by the Solid Waste Disposal Act amendments of 1980 (P.L. 96-482).

320 I.A.C. 4-1-1.

Thirdly, the Agreed Order was incorporated by EPA as part of the report entitled "Inspection of Ground-Water Monitoring Program" performed by Harding & Lawson Associates. Region V's Complaint states this report was a basis for its allegations. (Complaint, pp. 2 and 7-10; C. Ex. 4)

Fourthly, the Supreme Court has held that res judicata applies not merely to issues raised, but also issues which "could have been raised." The Environmental Management Board as the ultimate state authority for regulating the environment could have raised in 1982 and 1983 any issues including RCRA closure. Region V admits in its Complaint that Indiana was granted Phase I interim authorization to administer a hazardous waste program in lieu of the federal program as of August 18, 1982. This was six months prior to the effective date of the N-53 Agreed Order. Indeed, the state's Agreed Order specifically references hazardous waste regulations.

Indiana has continued to exercise jurisdiction over GDC as to both its construction and operations. Respondent's Exhibit 9 is Recommended Findings of Fact, Conclusions of Law and Order in Cause No. N-146 in Gary Development Company, Inc., Petitioner, v. Indiana Department of Environmental Management, Respondent, issued September 30, 1986. This was four months after Region V issued its Complaint. The N-146 Order was issued and certified

by Judge James M. Garrettson, who had been the hearing officer in Cause No. N-53. The N-53 Agreed Order is referenced on page 2 of the N-146 Findings, and is extensively quoted at Finding 17 on pages 3 through 7.

Most interesting are its Supplemental Findings of Fact 2 and 3 which discuss 28 state agency inspections at GDC's site between September, 1984, and June 5, 1986, the date of the second N-146 state evidentiary hearing. This was just six days after EPA issued its Complaint. Twenty of these inspections resulted in acceptable ratings. Nevertheless, Region V's Complaint filed at the end of this period of state inspections states that it was based on information including "an inspection report and correspondence from the Indiana State Board of Health (ISBH)." (Complaint, p. 1) This contradicts Region V's statement that "based on the review of these documents, violations of applicable state and federal regulations have been identified."

Region V's Mr. Cooper testified that EPA's action was requested by Indiana in October, 1985. No document was introduced to support this statement. To the contrary, Findings and Conclusions issued by IDEM Judge Garrettson on September 30, 1986, in Cause No. N-146 indicate substantial regulatory compliance by GDC. The state determined that the "ISBH [state agency] staff conducted twenty-one inspections [of the GDC site] between the period of September, 1984, and November 15, 1985" and "eighteen of those inspections result in an acceptable rating." (R. Ex. 9, p. 9, para. 2) Judge Garrettson reflected that his

prior Recommended Order sustaining the state agency's revocation of GDC's approvals to accept special, non-RCRA hazardous waste had been remanded to him on November 15, 1985, for the purpose of considering these agency inspection reports and the permeability results from the four ATEC borings of the site's west wall. (R. Ex. 9, p. 9) (These state agency inspection reports which depict the conditions at the facility from mid-1984 through December, 1985, were admitted into evidence. (R. Ex. 10))

The EPA Complaint certainly establishes the privity between Indiana and U.S. EPA. In fact, references to the state are throughout the EPA Complaint including:

> Paragraph 10 - "Pursuant to Title 320, Indiana Administrative Code (IAC) 4.1-10-2, generators of hazardous waste in Indiana must submit to the Technical Secretary of the Indiana Environmental Management Board (EMB) by annual reports which specify to whom their hazardous wastes have been sent in the preceding calendar year" and sets forth information from annual reports for Indiana Harborworks (LTV Steel) and American Chemical Service.
>
> Paragraph 10(c) - "Hazardous waste listed at 320 IAC 4.1-6-2."
>
> Paragraph 10(d) - "ISBH inspection of June 17, 1985" and "ISBH memorandum dated July 29, 1985."
>
> Paragraph 14 - "In a letter dated May 5, 1985, ISBH notified respondent of violations of financial assurance requirements discovered during a records review on March 26, 1985. No hazardous waste facility certificates of liability insurance have been received at ISBH as required by 320 IAC 4.1-2-24(a) and (b)."
>
> Paragraph 15 - "An inspection performed by ISBH on June 17, 1985, found the following violations at respondent's facility."
>
> Paragraph 16 - "On March 29, 1985, ISBH sent a letter to respondent notifying the facility of lack of compliance with requirements."

Paragraph 17 - "ISBH received an inadequate response from respondent."

The Region V Compliance Order even requires GDC to prepare and to submit to both U.S. EPA and IDEM several plans and assessments "for approval."

Therefore, the privity between EPA and the state of Indiana environmental agencies is without doubt, and at the time EPA's Complaint and Compliance Order was issued directing the manner of operations at GDC's facility, litigation was pending between GDC and the IDEM as to the construction and operation of GDC's facility. The elimination of such duplicative litigation was the "vital public interests" which Chief Justice Rehnquist held was the basis for not rejecting the "salutary principle of res judicata."

Related to the doctrine of res judicata is the doctrine of collateral estoppel. The Supreme Court has held that this doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In 1971, the U.S. Supreme Court found improper the mutuality doctrine which had prevented a party from using a prior judgment as an estoppel against another unless both parties were bound by the judgment. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 334, 91 S.Ct. 1434, 28 L.Ed.2d 788

(1971). Nevertheless, here mutuality exists due to the privity between the state and EPA established by RCRA, the Indiana Environmental Act and Regulations and EPA's Complaint. The Supreme Court in Parklane Hosiery, supra, at 332-333, held that:

> Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading [in a subsequent stockholders class action in the district court]. (emphasis added)

Region V's arguments against the applicability of res judicata and collateral estoppel are:

(1) Cause No. N-53 does not constitute a final judgment on the merits, but is only a settlement agreement reached before trial where no issues were ever litigated.

(2) The same parties were not involved because EPA was not a party to Cause No. N-53.

(3) Cause No. N-53 and EPA's 1986 Complaint do not arise from the same cause of action.

As to the first contention, EPA is attempting to enforce Indiana law. Thus, Indiana law of res judicata and promissory estoppel is applicable in addition to federal law. The Indiana Environmental Management Act provides for "agreed order[s]." I.C. 13-7-11-2(b). In Elder v. State Ex Rel. Department of Natural Resources, 482 N.E.2d 1383 (1985), the Indiana Court of Appeals unanimously held that a consent decree or agreed order

has the same effect as a judgment after litigation, holding at 1389:

> A consent decree is in the nature of an agreement or contract to cease activities asserted as illegal by a governmental entity. Black's Law Dictionary, 370 (5th ed. 1979).
>
> However, once sanctioned by the court it is an adjudication which has res judicata effect. 1BJ. Moore, Moores Federal Practice, para. 0.409[5] (2d ed. 1984). Consequently, a consent decree is an unappealable final judgment:
>
> > "That the judgment was rendered by consent of the parties does not detract from its dignity, or lessen its conclusiveness as an adjudication between the parties, but the consent is a waiver of error precluding a review upon appeal."
>
> State v. Huebner, 230 Ind. 461, 468, 104 N.E.2d 385, 388 (1952); accord McNelis v. Wheeler, 225 Ind. 148, 73 N.E.2d 339 (1947).

The Court of Appeals in Elder at 1390 went on to hold:

> The trial court correctly found the consent decree "fully adjudicated the rights and responsibilities between the parties and constitute[d] a judgment on the merits." The express provisions of the consent decree extinguished any claim between the parties regarding the Elders' property. (emphasis added)

The Court of Appeals in Elder upheld the granting of summary judgment for the Indiana Department of Natural Resources in a damages action for the taking of property for public use. Damages were barred because of a consent decree entered into during prior litigation wherein land had been conveyed to DNR in order for Elder to develop adjacent property without state permits.

As to Region V's second contention, being an actual party in the prior decision is unnecessary for the application of either

res judicata or promissory estoppel. See Federated Department Stores, supra, and Parklane Hosiery, supra. The bar is applicable to those having privity with a party. Privity is simply defined in Black's Law Dictionary (Revised 4th ed.) as derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; "mutuality of interest"; or as "cognizance implying a consent or concurrence." Black's defines a privy as "one who is a partaker or has any part or interest in any action, matter, or thing."

Region V begs the question by stating: "Nor was U.S. EPA privy to the Settlement Agreement" in Cause No. N-53. This is not the issue. The issue is whether privity exists between Indiana's environmental agency and EPA in the pending litigation. If so, EPA is bound by the Agreed Order approved by the ultimate authority of the state's environmental agency. As discussed previously in this Brief, EPA's Complaint is replete with references to the derivative interest growing out of the connection between EPA and the state of Indiana and their mutuality of interest in environmental regulation of GDC's facility.

Lastly, Region V merely argues that the 1983 action in Cause No. N-53 did not arise from the same cause of action. Nowhere in the decisions of the U.S. Supreme Court exists such an exception to the applicability of res judicata. The basis of the cause of action is not the issue. If it were, it would totally defeat res judicata and estoppel because parties could simply continue to

litigate in successive cases by merely developing new theories for new causes of action to reach the same result. The U.S. Supreme Court has squarely rejected Region V's contention, holding in United States v. Moser, 266 U.S. 236, 241, 45 S.Ct. 66, 69 L.Ed.2d 262 (1924), quoting from its prior decision in Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48:

> "'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'" (emphasis added)

The Court in Moser went on to conclude at 242:

> But a fact, questions or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. (emphasis added)

Irrelevant is the basis behind the state agency's original decision as to the right of GDC to construct and operate its facility. The issue here is simply the manner in which GDC will be required to construct its facility and to operate. Indiana in 1983 entered into an Agreed Order "govern[ing] construction and operations at the site." Region V three years later issued a Compliance Order requiring a totally different type of construction and operation and stating that GDC "must close its

facility." All of the alleged facts which EPA believes require GDC to close existed before the state Agreed Order was issued, and most facts even before the litigation in Cause No. N-53 was commenced in February, 1982. Even if GDC had disposed of RCRA hazardous wastes between December 5, 1980, and December, 1982, this was an issue which could have been litigated in Cause No. N-53. Hazardous waste disposal was certainly an issue because the Agreed Order states at paragraph 8(a) on page 7:

> The parties specifically agree that no "hazardous waste" as defined and identified in 320 I.A.C. 4-3 (1982 Cum. Supp.) (hereinafter called "RCRA hazardous waste") shall be deposited at Petitioner's landfill after the effective date of this Order.

Three years later, EPA attempted to litigate RCRA hazardous waste allegedly disposed at GDC prior to the effective date of the state Agreed Order. This is impermissible.

Consistent with federal law, the Indiana courts hold that "a prior judgment is conclusive not only as to matters actually litigated, but also as to issues which could have been litigated in the action." Estate of Apple v. Apple, 376 N.E.2d 1172 at 1176. The Supreme Court of Indiana in McIntosh v. Monroe, 232 Ind. 60, 111 N.E.2d 658, 660 (1953), quoted from its prior decision in Wright v. Anderson, 117 Ind. 349, 20 N.E.247 (1889), emphasizing that Indiana has long recognized:

> "'An adjudication once had between the parties bars and cuts off all future litigation, not only as to what was actually litigated and determined, but as to all matters that might have been litigated and determined in the action. This is the established doctrine of this court from the beginning.'"

The Indiana Court of Appeals likewise has quoted this holding by the Supreme Court in DeLater v. Hudak, 399 N.E.2d 832 at 835 (1980).

Indiana recognizes the applicability of the principles of res judicata to certain administrative determinations. The Court of Appeals of in South Bend Federation of Teachers v. National Educational Assn., 389 N.E.2d 23, 32-33 (1979), held:

> The weight of modern authority in Indiana and elsewhere convinces us that principles of res judicata should apply to certain administrative determinations.
>
> * * *
>
> "And the doctrine of res judicata has been applied to administrative action that has been characterized by the courts as 'adjudicatory,' 'judicial,' or 'quasi-judicial.'"

The effect of Indiana law and of administrative determinations on issue preclusion in actions brought under federal statutes was decided by the United States Court of Appeals for the Seventh Circuit in Bowen v. United States, 570 F.2d 1311 (1978) (reh'g and reh'g en banc denied). Bowen had received a license suspension from the National Transportation Safety Board for violating federal aviation rules by flying an aircraft without de-icing equipment into known icing conditions. He had crashed his aircraft while attempting to land at an Indiana airport. Later, Bowen brought a court action against U.S. air traffic control personnel alleging they negligently failed to warn him of icing conditions. The Seventh Circuit ruled that the prior agency suspension decision established Bowen's contributory

negligence by collateral estoppel and precluded his recovery under the Federal Tort Claims Act. The Seventh Circuit held in Bowen at 1321-1322:

> In dealing with prior judicial adjudications, the courts have not hesitated in recent years to expand the application of the collateral estoppel, or issue preclusion, branch of the doctrine of res judicata, with which we are concerned here, to better serve the underlying policy on which the doctrine is based, that one opportunity to litigate an issue fully and fairly is enough.
>
> Here the underlying policy, viz., that one fair opportunity to litigate an issue is enough, is best served by the rule that issue preclusion applies to a final administrative determination of an issue properly before an agency acting in a judicial capacity when both parties were aware of the possible significance of the issue in later proceedings and were afforded a fair opportunity to litigate the issue and to obtain judicial review.
>
> * * *
>
> We therefore conclude that, under Indiana law, the plaintiff was estopped from relitigating the issue of whether his conduct violated Federal Aviation Regulations and the underlying fact issues. Because, under that law, the determination of these issues adversely to plaintiff requires the conclusion that he was negligent, and contributory negligence is an absolute bar to recovery, plaintiff could not succeed in his Federal Tort Claims Act suit. (emphasis added)

C. The Language of RCRA Section 3008 Nowhere Provides EPA With Authority to Enforce State Laws and Regulations.

Region V's Complaint concludes under "Jurisdiction": "Section 3008(a)(2) of RCRA, 42 USC §6928(a)(2), provides that U.S. EPA may enforce State regulations in those States authorized to administer a hazardous waste program." Nowhere does Section 3008(a)(2) or (a)(1) grant EPA authority to enforce state

regulations. Subsection (a)(2) merely discusses "violation of any requirement of this subtitle" of RCRA. Subsection (a)(1) likewise only discusses "violation of any requirement of this subtitle" of RCRA. Congress had granted no authority for the federal agency to bring an action within the same federal agency to enforce state laws and regulations. Contrary to Region V's Complaint, the statute simply is void of the alleged language that "U.S. EPA may enforce state regulations."

Nor does the legislative history of RCRA as set forth by the district court in United States v. Conservation Chemical provide that Congress intended EPA to have authority to enforce state laws and regulations in federal forums. Congress merely stated that "where a state is not implementing a hazardous waste program," EPA may "implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements." 5 U.S. Code Cong. & Admin. News, at 6269 (1976). EPA could not possibly bring an action to enforce state hazardous waste laws in a state where no program was implemented and enforced or where the state program "does not meet the federal minimum requirements." This is non-sensical. How could EPA first determine that a state had not implemented a proper program or did not meet the minimum requirements, but then attempt to enforce this non-existing or non-conforming state program?

RCRA Section 3008(a) as quoted by the district court in Conservation Chemical states, in its entirety:

> COMPLIANCE ORDERS.--(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
>
> (2) In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section. (emphasis added)

Indeed, RCRA Section 3006(b) cited by Region V provides that EPA will not authorize a state program if "such program does not provide adequate enforcement of compliance with the requirements of this subtitle."

The only other statute cited by Region V to support its jurisdiction is RCRA Section 2002 (a)(1). It merely provides that the Administrator is authorized to prescribe regulations necessary to carry out his functions under the Act. Nowhere in §2002(a)(1) does Congress provide the Administrator with authority to enforce state laws within the federal agency. The three RCRA sections cited by Region V simply do not even mention authority to enforce state laws.

State laws and state regulations are to be enforced by the state administrative agencies in Indiana judicial forums. Eliminating such would subvert and eliminate a defendant's due

process rights to judicial review under the procedures established by Indiana. Indeed, even if one assumes that a federal agency had the right to enforce state laws and regulations, it is axiomatic that the federal agency would also be obligated to follow all of those state laws and regulations. This would include the procedural requirements required by the Indiana Environmental Management Act at I.C. 13-7-11-2 which incorporates all provisions of Indiana's Administrative Adjudication Act, I.C. 4-21.5. A federal agency cannot be authorized to enforce the laws and regulations of a specific state agency and at the same time ignore the specific due process procedures established by those same laws and regulations.

D. The American Chemical Paint Sludge Was Not an F005 Waste, But Rather a D001 Waste Which Was Treated to Eliminate Its Ignitability.

Pursuant to the request of the state environmental agency, American Chemical's President James Tarple had forwarded manifests of 33 shipments of waste by American Chemical to GDC. (TR Vol. II, p. 553-554) American Chemical also sent a letter to Region V's Mr. Cooper on October 24, 1986, advising him that the waste manifested to GDC as F005 should have been manifested as D001 (See Ex. 22; and TR Vol. II, p. 545) Mr. Tarple explained that two years after shipping the waste, American discovered it had been "classifying mixed solvent waste under a listing code which was set aside for pure solvents and not for the solvent mixtures." The spent cleaning solvents shipped to American and

subsequently to GDC for disposal were D001 waste. Mr. Tarple explained that the shipments to GDC were pre-1986 (1980 and 1981), that American knew the source of the generation of the material to be paint materials and solvents sent to customers who had cleaned equipment and then shipped them back, and that EPA's "Mixture Rule," as discussed by Region V's Mr. Cooper, was not in effect during this period.

Mr. Tarple explained that during 1980 when the regulations were first promulgated, American placed the code F005 on its manifests because it found certain components in this material listed in the "F" waste list. However, in 1983, American realized that the "listing was specific to those compounds used in their pure form and generated as byproducts." (TR Vol. II at 549-550) During 1986, EPA amended the regulations to provide that if a waste has a certain percentage of a particular listed waste, then it becomes that listed waste even though it is mixture. (TR Vol. II, p. 551)

EPA Inspector Richard Shadross advised American that it was "mis-coding the waste as an F-listed waste," and "it should more properly be categorized as a D001 waste." (TR Vol. II, pp. 552-553) Complainant's Exhibit No. 3 at page 3 and No. 28 reveals that Mr. Shadross was then the State Implementation Officer for U.S. EPA Region V in Indiana. GDC had specific written approval from the state environmental agency to dispose of American Chemical paint sludge under specific instructions. (TR Vol. III, at pp. 748 and 749) Although American did not go back and amend

the incorrect manifests, it did amend its Part A application to reflect the correct waste streams handled. (TR Vol. II at p. 557) During cross-examination, Mr. Tarple explained that when these shipments were made to GDC, the existing regulations did not allow him to determine the hazard code by a review of the waste analysis. (TR Vol. II, p. 558) During the hearing, counsel for the parties and the Administrative Law Judge recognized that the July, 1986, version of 40 C.F.R. Part 261 did not yet contain the Mixture Rule discussed by Mr. Tarple. (TR Vol. II, pp. 562-564) The rule was not retroactive. Thus, the shipments of this waste to GDC by American Chemical during 1980 and 1981 was not subject to this new rule. American's waste was unlisted D001 waste only because of its characteristic of ignitability.

Mr. Hagen testified that before disposing of the American Chemical D001 waste, Gary mixed it with sand to render it nonflammable. (TR Vol. III, pp. 699-700) Thus, when disposed of, this waste was no longer hazardous due to the characteristic of ignitability. GDC mixed the American Chemical waste with sand because (1) placing ignitable material in the landfill where equipment generates sparks could create a fire and perhaps personal injury, (2) the Indiana Solid Waste Management Regulations preclude a sanitary landfill from taking ignitable waste and (3) the state environmental agency's written approval to take the American Chemical waste specified that it was to be mixed for disposal. (TR Vol. III, at p. 700)

Thus, Region V has failed to meet its burden of proof to establish that the American Chemical waste was F005 listed waste. Indeed, the only evidence in the record was that the waste was improperly manifested by American, should have been manifested as D001 waste due only to its ignitability and was treated by GDC prior to disposal to render it inflammable. Such a procedure is consistent with 40 C.F.R. 265.281 and 40 C.F.R. 265.312(a) (1983). The latter regulation provided:

> (a) Except as provided in paragraph (b) of this section, and in section 265.316, ignitable or reactive waste must not be placed in a landfill, unless the waste is treated, rendered, or mixed before or immediately after placement in a landfill so that:
>
> (1) The resulting waste, mixture, or dissolution or material no longer meets the definition of ignitable or reactive waste under section 261.21 or section 261.23 of this chapter.

During 1984, Mr. Hagen became aware that EPA was considering classifying GDC as a RCRA site due to the American Chemical waste. However, neither EPA nor state staff discussed any RCRA waste from U.S.S. Lead or Jones and Laughlin as making GDC subject to RCRA. (TR Vol. III, at p. 703)

E. Region V Failed to Prove that Waste Accepted for Disposal From U.S.S. Lead Was a D008 RCRA Waste.

GDC admitted before the hearing that it had disposed of broken battery casings and neutralized calcium sulfate material from U.S.S. Lead. (Responsive Pleading, para. 8(d)) Indeed, GDC responded that its Vice-President had advised a state environmental agency employee of this disposal. Region V's only

evidence consisted of numerous U.S.S. Lead waste tracking forms. (C. Exs. 23 and 33) GDC's Mr. Hagen testified that prior to the exchange of discovery documents with Region V counsel, he had never seen these tracking forms. (TR Vol. III, at pp. 683-684) The only witnesses who testified as to any firsthand knowledge regarding U.S.S. Lead waste and these waste tracking forms were Larry Hagen and Dan McArtle. Mr. McArtle had been employed with Industrial Disposal Corporation, the company which had transported U.S.S. Lead's waste to GDC. (TR of Dec. 18, 1990, p. 918)

Mr. Hagen described the material as consisting of neutralized calcium sulfate shipped in 20-yard boxes without RCRA manifests and which also had been identified by U.S.S. Lead as "neutralized battery acid." U.S.S. Lead had advised Mr. Hagen that this waste was the divider material between the cells in a battery, and "not the lead plate, but the divider cells -- which came in contact with acid." U.S.S. Lead represented that the acid was neutralized. (TR Vol. III, at pp. 760-761) GDC had never received RCRA manifests from U.S.S. Lead for these wastes. (TR Vol. III, at p. 761) Mr. Hagen testified: "It was definitely not a manifested load, but it may have said U.S.S. Lead on their waste tracking form type thing." (TR Vol. III, at p. 762)

Mr. McArtle of Industrial Disposal testified that he had prepared the "Hazardous Waste Tracking Form" between 1978 and 1980, which form comprises Complainant's Exhibits 23 and 33. (TR

of Dec. 18, 1990, at pp. 918-919) He testified that the form was utilized by Industrial Disposal for both RCRA hazardous waste and other waste. (TR 919-920) All of the documents comprising Complainant's Exhibits 23 and 33 were forms of "Industrial Disposal Corporation, 2000 Gary Avenue, East Chicago, Indiana 46312." The completed forms for U.S.S. Lead Refinery waste under the instruction entitled "Special Handling" were marked "none." Mr. McArtle testified that this meant that the state did not have any restrictions on the waste. (TR 920 and 921)

Several of the tracking forms which indicated "none" for special handling specified that the waste was "calcium sulfate." (TR 922) Mr. McArtle identified a 1977 letter from the state environmental agency which authorized GDC to dispose of calcium sulfate of U.S.S. Lead Refinery. (R. Ex. 18; TR 922-924) Other U.S.S. Lead manifests specified the waste to be "cubic yards of battery cases," "yards of battery cases," "battery cases," "cubic yard solid calcium sulfate" and "cubic yard box of rubber battery chips." All forms were marked "none" for special handling. (TR 924-925) Several of the tracking forms had typed on them the phrase "Hazardous Waste Solid NOS-ID 9189 Lead." Form number 2458 was marked with only "ID NA." Forms number 2458 and 2457 specified only "NA." All of the forms marked as "NA" were dated during 1982. (TR 928)

Although the original form prepared by Mr. McArtle was entitled "Hazardous Waste Tracking Form," Industrial Disposal used this form for all wasted during this period, "regardless of

whether it was hazardous or non-hazardous." (TR 928-929) Because Industrial later recognized that the title on the form was "misleading," it deleted the word "Hazardous" in the title. (TR 929) After Complainant's Exhibit 33 (tracking forms for U.S.S. Lead waste) was admitted into evidence in 1990, Mr. Hagen reiterated that the U.S.S. Lead waste was not RCRA manifested to GDC, but instead came to it with tracker forms. (TR 938) He also related that:

> The forms that they have submitted and that I've looked at are a form of waste tracking form for, excuse me, special waste, which almost every load that Industrial Disposal hauled to us from whoever and wherever, from the many different companies they serviced, they brought a waste tracking form, very similar to that or identical to that, I can't remember, which our people signed and it was like Dan McArtle had said, it was an assurance thing for them to their customer that their waste had been disposed of in a permitted landfill.

(TR 938 and 939)

Mr. Hagen believed these copies of tracking forms represented that GDC had accepted all waste from U.S.S. Lead as "a non-RCRA hazardous, but as a special waste under authority or special waste definition from the State of Indiana." (TR 939) He explained that the 1977 letter from the state environmental agency was an approval to dispose of U.S.S. Lead's waste "as a special, which the state had a category called hazardous waste, . . . but 'hazardous' under state law was not hazardous under RCRA law." (TR 940) "We accepted that waste as a special waste under a waste tracking form." Indeed, the 1983 state N-53 Agreed Order authorizes GDC to dispose of only certain

"'hazardous waste' as defined in 320 I.A.C. [Ind. Ann. Code] 5-2-1(19) (1982) (hereafter called 'special waste')", but no "'hazardous waste' as defined and identified in 320 I.A.C. 4-3 (1982) (hereafter called 'RCRA hazardous waste.')" (R. Ex. 4, p. 8, para. 8.a.)

Therefore, the waste from U.S.S. Lead was not manifested as a RCRA waste even during 1982, but was shipped only accompanied by a waste tracking form used by the transporter for both hazardous and non-hazardous waste. No witness testified that any of the waste was actually RCRA hazardous. Indeed, the only authentication for the introduction of the waste tracking forms was the testimony of EPA enforcement employee Mr. Cooper that another EPA employee had copied these records in 1987 at U.S.S. Lead. (TR 875) (Mr. Cooper also had determined the $117,000 penalty.) During the hearing, Judge Greene recognized regarding these tracking forms: "I think at the very least we should find the person who actually made the copies who--." (TR 886) Responding to Regional Counsel's comment that this employee was no longer with the agency, the judge stated:

> "Well she presumably is still alive, and this--I have the same problems. There just is really no--nothing to tie anybody to this. All we have is documents and testimony that somebody went somewhere and copied them. Now it really isn't fair. There are people who could have been called, and even if this lady is not still an employee of the EPA, you could bring her. . . . It just really is not fair to the defense and I presume that [the] agency too does not wish any action it takes to be founded upon evidence which really is not perfectly fairly based."

(TR 886 and 887)

These tracking forms do not come close to the requirements for RCRA manifests. See 40 C.F.R. §262.20 (1983) and Appendix to Part 262. They lack most of the information then specified as "required" by 40 C.F.R. Part 262.21 (1983), including the required certification by the generator. Indeed, the only testimony was that U.S.S. Lead had represented and GDC believed this waste to be non-RCRA. Responding to a question from Regional V counsel, Mr. Hagen revealed U.S.S. Lead had never even provided GDC with an analysis for this waste. No generator could have its waste transported and disposed at a landfill without providing a chemical analysis. 40 C.F.R. Part 265.13 (1983) provided at (a)(1):

> Before an owner or operator treats, stores, or disposes of any hazardous waste, he must obtain a detailed chemical and physical analysis of a representative sample of the waste.

F. The Acceptance for Disposal of K087 Tar Decanter Waste of Jones and Laughlin Steel Corporation Is Not Supported by Region V's Limited and Unsupported Documentary Evidence.

Just like its attempt to prove the disposal of alleged RCRA waste from American Chemical and U.S.S. Lead Refinery, Region V offered no testimony regarding the Jones and Laughlin decanter waste from any witness having specific knowledge as to its transportation, disposal or even manifesting. Instead, Region V merely submitted for the first time in its rebuttal and more than three years after resting its evidentiary case (TR of 1987 at 581 and 781), an affidavit from Carl Broman, the Superintendent for

Environmental Control of Jones and Laughlin ("LTV") steel plant at East Chicago. Although Mr. Broman was called as a witness by GDC and testified on September 10, 1987, he was not able to describe the original manifesting, transporting or disposal of tar decanter waste. Mr. Broman testified that he had "no personal, first-hand knowledge" as to "whether the waste set forth on those manifests was actually disposed of at Gary Development." (TR Vol. II, p. 375)

Also, GDC called as a witness Danny McArtle, who was an employee of the company set forth on the manifests as the transporter of the decanter sludge, i.e., Industrial Disposal Company. Nevertheless, Region V refused to ask Mr. McArtle any questions regarding Industrial's transportation and the procedure it used for obtaining manifest signatures for the disposal of J & L's waste. EPA's Cooper testified that even though Industrial Disposal appeared as the transporter on each manifest for this J & L waste, EPA could not get in touch with anyone who worked for Industrial because it was out of business. (TR 903) This truly is unbelievable in that GDC was capable of subpoenaing Mr. McArtle who was employed by and actually had prepared the waste tracking forms used by Industrial Disposal. GDC was never even provided by J & L with a waste analysis of the J & L waste, as was required if this was a RCRA waste sent for disposal. See 40 C.F.R Part 265.13(a) (1983). (TR 955)

A careful reading of the Broman affidavit and a careful review of the copies of the J & L manifests (C. Ex. 31) reveals

that J & L's form is not likely to advise a landfill facility of the type of waste transported as required by 40 C.F.R. Part 262.21(a)(5). Also, this type of form would not allow the disposal facility to return to the generator a complete copy signed by the disposal facility official as required by 40 C.F.R. 265.71(a)(4). J & L Steel's form was not generic, but had a part A describing the generator, the waste and the transporter; and a part B which merely was for the signature of the disposal facility. (TR 894) No testimony exists in the record that the part A describing the waste would ever be presented to the disposal facility upon delivery. Indeed, EPA's Cooper finally admitted that the affidavit of Mr. Broman only discussed two parts and two pages to the form and not three parts and pages as he had speculated. He admitted EPA had no information "one way or the other" as to whether GDC ever received a copy of the entire J & L manifests. (TR 902 and 904)

The only testimony was that the first page of the part A and part B stays with J & L, the duplicate page is given to the transporter and the part B of the transporter's duplicate containing only the signature portion for a disposal facility is returned to J & L. (TR 901) This unusual type of manifesting system would eliminate the disposal facility from being a part of the "check-and-balance" system to ensure that particular waste listed as shipped on a manifest is actually received by that facility. By having only one duplicate and by separating the part B section of the duplicate from its part A, the J & L form

did not comply with the manifesting requirements in 40 C.F.R. Part 262.22 (1983) which provided:

> The manifest consists of at least the number of copies which will provide the generator, each transporter, and the owner or operator of the designated facility with one copy each for their records and another copy to be returned to the generator.

Neither Mr. Hagen, Brian Boyd nor Mr. Hagen's son had ever seen part A of the manifests describing the waste to be tar decanter sludge. (TR 948) GDC's Hagen testified that prior to discovery in this case, he had never seen the part A's of the Jones and Laughlin manifests comprising Complainant's Exhibit 20. (Also Ex. 31) (TR Vol. III, at p. 696) GDC was never provided by Jones and Laughlin with any chemical analysis of the K087 tar waste as was required for a facility to dispose of a RCRA waste by 40 C.F.R. Part 265.13(a)(1) (1983). (TR 955)

Indeed, Complainant's Exhibit 31 admitted only during Region V's rebuttal itself reveals the fallacy of this J & L system. EPA's Cooper testified that he had carefully reviewed and matched up all J & L manifests for decanter waste and determined that they contained signatures of GDC's employees. However, manifests 01821 and 02080 were signed as received at GDC by an M. Lopez. (TR 904) M. Lopez is a driver for the transporter Industrial Disposal. (TR 944) Mr. Cooper admitted that this "certainly wouldn't be the standard procedure." (TR 905)

Manifests 0832 and 12752 were signed at part B by an individual who was not a GDC employee and not known by Mr. Hagen.

Likewise, manifests 12309, 12750 and 01822 were signed with a signature unknown to Mr. Hagen. (TR 943 and 944) Eight manifests had the name of Brian Boyd printed in part B, while others had Mr. Boyd's name by signature. Mr. Boyd never printed his signature on manifests, and his actual printing is different than that on these eight manifests. (TR 944 and 945) The printing in blue ink on the yellow post-it note is by Brian Boyd. (TR 951) Nineteen manifests had either illegible signatures or missing information due to poor quality. (TR 946) Six manifests did not describe the waste material. (TR 947) One manifest contained two numbers, i.e., 7302 and 01824.

The manner of copying manifest 1824 demonstrates that part A and part B were no longer attached but had been laid together in a copier. Its part B was crooked on the page. (TR 948 and 949) Likewise, manifest 12308 demonstrates that parts A and B were separate. (TR 949) Also, manifest 01816 dated April 13, 1981, containing the signature of Mr. Hagen on part B shows by its copying that parts A and B were not attached, but had been reproduced by laying them together in a copying machine. (TR 953) Mr. Hagen had never seen part A of this manifest until it was provided in the courtroom. (TR 954)

Thus, the Jones and Laughlin manifests for tar decanter waste contain numerous irregularities, would not inform GDC of the type of waste material because only part B was delivered by Industrial Disposal to the GDC ticket booth, and had only two copies rather than the required minimum of four. These manifests

standing alone and without supporting testimony are insufficient evidence for the agency to determine that GDC accepted RCRA hazardous waste for disposal and thus should be classified as a RCRA disposal facility. The Complainant refused both during its case-in-chief and its extensive rebuttal to call a witness having actual knowledge of the original manifests or knowledge of the transportation or disposal of J & L tar decanter waste. Indeed, Region V did not obtain testimony about the actual disposal of this waste when it was afforded the opportunity to cross-examine J & L's environmental Superintendent Broman and Industrial Disposal's former employee Mr. McArtle. Both of these individuals work in the Gary and East Chicago area and appeared as witnesses when subpoenaed by GDC. The Complainant's failure to call a witness to discuss any of these manifests and to attempt to explain the irregularities as well as the manner in which part B was separated and utilized, substantially detracts from the weight of its evidence.

IV. CONCLUSION

The Complainant Region V lacked the necessary jurisdiction to bring this action against GDC because:

(1) The EPA Administrator has precluded EPA bringing actions compelling RCRA closure where a state has received RCRA authorization to commence closure proceedings,

(2) Res judicata and collateral estoppel bar this action because of a 1983 state Agreed Order which determines the construction and operation of GDC's facility and

(3) RCRA does not authorize EPA to enforce state laws and regulations.

Furthermore, EPA's evidence of alleged RCRA waste consisted of form documents unsupported by testimony from witnesses with knowledge as to their authenticity, accuracy and correctness as to type of waste and the actual place of disposal. Region V has failed to meet the burden of proof necessary to support a determination that GDC should be classified as a Resource Conservation and Recovery Act landfill facility. A judgment should be issued that GDC is not a facility subject to regulation under RCRA.

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By _____
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PROOF AND CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Post-Hearing Brief of Gary Development has been served upon the following via Federal Express, this 8th day of May, 1991:

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